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MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

No. .....

RYLAND S. FELTS,

*Petitioner,*

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS**

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## TABLE OF CONTENTS


*Page*

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

QUESTIONS PRESENTED FOR REVIEW ..... 2

STATUTE INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING WRIT ..... 6

CONCLUSION ..... 13

CERTIFICATE ..... 14

---

APPENDIX

Opinion of the Trial Court ..... App. 1

Opinion of the Fourth Circuit Court of Appeals ..... App. 15


## TABLE OF CITATIONS

### Federal Cases


Byrne v. Pennsylvania Railroad Co., 262 F. 2d 906 (3rd Cir. 1958), cert. denied, 359 U.S. 960, 79 S. Ct. 798, 3 L. Ed. 2d 766 (1959) ..... 12

Cimorelli v. New York Central Railroad, 148 F. 2d 575 (6th Cir. 1945) ..... 12

Missouri-Kansas-Texas Railway Company v. Hearson, 422 F. 2d 1037 (10th Cir. 1970) ..... 12

Schroeder v. Pennsylvania Railroad Company, 397 F. 2d 452 (7th Cir. 1968) ..... 12

*Page*

United States v. Pullman Co., et al., 50 F. Supp. 123 (E.D. Penn. 1943); 53 F. Supp. 908 (E.D. Penn. 1944); 64 F. Supp. 108 (E.D. Penn. 1946) ..... 8

**Supreme Court Cases**

Baker v. Texas and Pacific Railroad Company, 359 U.S. 227, 79 S. Ct. 664, 3 L. Ed. 2d 756 (1959) ..... 6, 7, 8, 11

Robinson v. Baltimore and Ohio R. R. Co., 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849 (1915) ..... 7, 8, 10, 11

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 at 500 (1957) ..... 6

**Statute Involved**

45 U.S.C.A. Section 51 Federal Employers' Liability Act, page 150 3

# Supreme Court of the United States

No. .....

RYLAND S. FELTS,

*Petitioner,*

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Ryland S. Felts, hereby petitions for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals made on March 15, 1972 which affirmed the decision of the District Court.

### OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion decided on March 15, 1972 and the District Court's opinion decided on September 3, 1971, are appended hereto in the appendix. The opinions of the Fourth Circuit and the District Court have not been officially reported at this time.

## JURISDICTION

The order sought to be reviewed was made and entered on March 15, 1972. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Was there sufficient evidence to make a jury issue under the Federal Employers' Liability Act as to whether Felts, a Pullman conductor, was an employee of the Seaboard?

2. Does the decision of the court below restrict the fact finding role of the jury in Federal Employers' Liability Act cases.

## STATUTE INVOLVED

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to *any person suffering injury while he is employed by such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by

reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Italics Ours) (See 45 U.S.C.A. Section 51 Federal Employers' Liability Act page 150)

## STATEMENT OF THE CASE

The petitioner, a Pullman conductor, filed a complaint under the Federal Employers' Liability Act alleging that he was injured while in the employ of the Seaboard. The jury found that Felts was employed by the Seaboad and awarded him damages in the amount of $20,000.00. The trial court set aside the jury verdict for insufficient evidence and held that Felts, as a matter of law, was not an employee of the Seaboard (See App. 15).[1] The Fourth Circuit Court of Appeals affirmed this decision for the reasons stated by the District Court (See App. 16).

Felts was a Pullman conductor who reported to work in Richmond, Virginia on the Seaboard Silver Comet Train No. 33 on May 7, 1968 (App. on Appeal 108; T-209). The Seaboard on May 7 had specifically requested that two additional Pullman sleepers be added to its train (App. on Appeal 110; T-209). Normally only one sleeper was used on the Silver Comet with no Pullman conductors (App. on Appeal 83, 84). Felts went to work that day because of the addition of the sleepers by the Seaboard.

Felts then noticed in Richmond that Seaboard passengers were not unloading and asked the porter what was wrong (App. on Appeal 108, 109). The porter reported that the trap door was hung and would not open automatically by

[1] Reference will be made in the following manner (App. on Appeal) means the printed appendix on appeal; (T-) means trial transcript; (App.) means appendix in petition for certiorari, and reference will be made to Exhibits introduced at the trial.

pushing the plunger (App. on Appeal 109; T-206, 208). The problem was then reported to railroad car inspectors who later reported that the door was fixed and working fine (App. on Appeal 110; T-208).

The Seaboard train next stopped at Petersburg, and Felts noticed again that Seaboard passengers were not boarding because the same trap door would not open (App. on Appeal 112). Felts then injured himself while attempting to open the trap door (App. on Appeal 114; T-214).

The evidence at the trial showed that it was the Seaboard and not the Pullman Company who determined how many Pullman cars were to be placed on the Silver Comet and the type of car needed (App. on Appeal 46; T-114, 174). In fact, the railroads owned the cars and not the Pullman Company as reported by the trial Judge in his opinion (T-110). The Seaboard and not the Pullman Company determined the need of any Pullman cars and could cut a Pullman car off at any time even in route (App. on Appeal 84, 85, 86; T-176).

The Pullman Company in its instructions to Pullman conductors required its Pullman conductors "while *in cars, on trains, in stations and yards, or on other railroad property" to be subject to the instructions of the train conductor and officials of the railroad companies* (Italics Ours) (App. on Appeal 59; T. 120) (Def. Exh. One P. 1). In addition to complying with the instructions of railroad employees, the Pullman conductor had to obey the rules and regulations of the railroad (P. Exh. Four P. 4). The Seaboard controlled the details of Felts' work in that the railroad conductor was in complete control (App. on Appeal 48; 111; T-118, 183, 210) and had the right to make the Pullman conductor perform his duties properly (App. on Appeal 48; T-117, 118). The Seaboard conductor supervised the services of the Pull-

man conductor (T-183, 210) and had the right to remove a Pullman conductor from the train for non-compliance with his instructions or failing to perform his services properly (App. on Appeal 48; T-118, 219). The train conductor's control over the Pullman conductor was so extensive that the train conductor and not the Pullman conductor was ultimately responsible for discipline and obedience of Pullman passengers and employees (See Def. Exh. One, P. 1, 39), could seat railroad coach passengers in Pullman cars if space was available (App. on Appeal 173, 174), resolved disputes in seating arrangements in Pullman cars (Def. Exh. One P. 140) (App. on Appeal 56), controlled the movement of passengers (Def. Exh. One P. 44), had unlimited access to Pullman cars (App. on Appeal 51; T-121, 122), and enforced Pullman regulations (Def. Exh. Seaboard Coast Line Manual P. 18).

Carnes, the Seaboard train conductor at the time of Felts' injury, fully agreed with the testimony of the Pullman employees that he was responsible and in charge of the train (App. on Appeal 162; T-320) and was specifically responsible for conduct, safety, and keeping the train on time (T-320). In reference to his control over the crew including Pullman employees, Carnes equated his position to that of a captain of a ship (App. on Appeal 174; T-335, 336). Carnes had the right to control the conduct of a Pullman conductor by having the authority to wake up a Pullman conductor that was sleeping who was supposed to be working and would report it to the railroad superintendent and not the Pullman officials (App. on Appeal 176; T-335, 336).

Evidence did show that the Pullman Company hired the Pullman conductors (App. on Appeal 190; T-355, 356), that the Pullman Company assigned the conductors (App.

on Appeal 67), that the Pullman Company supplied some of the conductor's equipment such as uniforms, rate books, call cards, and fare books (App. on Appeal 70, 71; T-151-161), and that the Pullman Company controlled the conductor's transfer, vacations, and furloughs (App. on Appeal 190, 191). Although the Pullman conductor received his pay check from the Pullman Company (T-162), the operating agreement between the railroads and the Pullman Company showed that the Seaboard was bearing the expense of the conductors (See P. Exh. Four, Uniform Service Contract, P. 27, 28).

**REASONS FOR GRANTING WRIT**

The Court has always protected a railroad employee's right to have a jury pass on issues raised under the Federal Employers' Liability Act. Most notably in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 at 500 (1957) this Court reinstated a jury verdict and held

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. *Judges are to fix their sights primarily to make that appraisal, and if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities . . .*" (Italics Ours)

In *Baker* v. *Texas and Pacific Railroad Company*, 359 U.S. 227, 79 S. Ct. 664, 3 L. Ed. 2d 756 (1959) this Court established the standard for proving an employer-employee relationship under the Federal Employers' Liability Act and held that the question of employment

> *"like that of fault or of causation under the Act contains factual elements such as to make it one for the jury."* (Italics Ours) See *Baker, supra,* p. 228.

In *Baker, supra,* this Court held that it was a jury issue as to whether an employee hired by an independent contractor was an employee of the railroad where the railroad furnished materials to be used in the road work, the work being done was a part of the railroad's work, and the supervisors of the railroad exercised control over the details of the work.

The decisions of the District Court and Fourth Circuit in the proceedings below relied on the decision of *Robinson* v. *Baltimore and Ohio R. R. Co.,* 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849 (1915) and the cases that have followed *Robinson* for the proposition that a Pullman employee, as a matter of law, is not an employee of the railroad under FELA. The petitioner does not dispute the reasoning and precedent of *Robinson, supra,* but only that the facts here do not warrant the application of the reasoning and judicial precedent of *Robinson.* It is to be noted that the Supreme Court at the time it decided *Robinson* inquired as to

> *"whether the plaintiff comes within the statutory description, that is, whether upon the facts disclosed in the record, it can be said that within the sense of the Act the plaintiff was an employee of the railroad company . . . ."* (Italics Ours) See *Robinson, supra,* p. 92.

The Court concluded at that time that the facts did not warrant submitting to the jury the issue of whether a Pullman porter was an employee of the railroad under FELA, but did not hold that a Pullman porter was as a matter of law, not an employee of the railroad regardless of the facts and circumstances. *Baker* cited *Robinson* in its

opinion because the Federal Employer's Liability Act did not use the terms "employee" and "employed" in any special sense. "Each case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative." See *Baker, supra,* p. 228.

It is to be noted that since the decision in *Robinson* and most of the cases that have followed *Robinson* there has been a significant change in the relationship of the Pullman Company to the operating railroad as a result of the Sherman Anti-Trust Action in the 1940's, culminating with the railroads becoming the owners of the Pullman Company. See *United States* v. *Pullman Co., et al.*, 50 F. Supp. 123 (E.D. Penn. 1943); 53 F. Supp. 908 (E.D. Penn. 1944); 64 F. Supp. 108 (E.D. Penn. 1946). Although ownership of the Pullman Company by the railroads does not per se make Pullman employees employees of the railroad, it is a reason why the facts have significantly changed from the time of *Robinson* as shown below.

A review of the facts here in Felts, when contrasted with those of *Robinson* shows that the reasoning of *Robinson* was erroneously extended by the courts below to a factual case which was for the jury to decide under *Baker*.

In *Robinson, supra,* the Court noted that the only control the railroad had was that control essential for the railroad to perform its functions as a common carrier. The only control present in *Robinson* was that the Pullman employees agreed in their contract with the Pullman Company to abide by the rules and regulations of the railroad over which they operated. The contract between the employees of Pullman and the Pullman Company emphasized the employee's duty to comply with *all rules and regulations and orders of the Pullman Company.* (Italics Ours) The Court then stated:

> "With this limitation, the Pullman Company supplied its own facilities, and for this purpose organized and

controlled its own service, including the service of porters; it selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure." See *Robinson, supra*, p. 93.

In Felts, the control by the railroad over the Pullman employees was not limited to the obedience to rules and regulations of the railroad so it could perform its functions as a common carrier. Pullman, after providing that the Pullman conductor was subject to instructions of the officials of the Pullman Company, instructed the Pullman conductor that, "while on cars, in trains, in stations and yards, or on other railroad property, they (Pullman conductors) also are subject to the instructions of the train conductor and officials of the railroad companies" (App. on Appeal 59, 120; Def. Exh. One P. 1). In addition to being subject to the unlimited instructions of the train conductor and railroad officials, the Pullman conductor was also subject to the rules and regulations of the railroad company on which he operated (Def. Exh. One Pp. 6, 23; P. Exh. Four P. 4).

Further, the ore tenus evidence at the trial indicated that the control of the Seaboard over the Pullman conductor was that of an employer-employee relationship since the Seaboard had the right to control the manner of the performance of the work of the Pullman conductor. For example, Carnes, the Seaboard train conductor, stated that he was in charge of the train (App on Appeal 162; T-320) and captain of the ship (App. on Appeal 174; T-335, 336). Carnes' control was not limited to keeping the train on time and safety, but extended to conduct. The Seaboard train conductor had the right and authority to wake up a sleeping Pullman conductor and make him work, and would report such an instance to the railroad superintendent (App. on Appeal 176; T-335, 336). If the Pullman conductor could

not control his own employees, he had to report the matter to the train conductor for his handling (Def. Exh. One P. 1). It was the train conductor, not the Pullman conductor, whose instructions had to be followed in cases where passengers did not obey Pullman regulations (Def. Exh. One P. 39). Felts and Riely both testified that the train conductor supervised their work to the extent that he could make them perform their duties properly, including the right to take them out of service if they did not (App. on Appeal 48, 118). It is submitted that since the Pullman conductor was subject to all instructions by railroad officials and a train conductor, that the train conductor supervised the Pullman conductor's work, including the right to tell him how to do his duties, that the train conductor had the right to handle other Pullman employees who were not obeying Pullman regulations, and to control Pullman passengers, Felts did not have the independent judgment in the execution of his duties to make him, as a matter of law, not an employee of the Seaboard.

At the time of *Robinson,* the Pullman Company furnished the facilities (See *Robinson, supra,* p. 93). However, in Felts, the railroad owned the cars (App. on Appeal 47; T-110), Pullman worked on railroad property (App. on Appeal 82), the railroad supplied the original complement of commissary service (P. Exh. Four P. 5), the railroad furnished the original complements of blankets, linens, mattresses, and other items of movable equipment (See P. Exh. Four P. 3), the railroad furnished ice, water and fuel (P. Exh. Four P. 9), the railroad maintained storage space (P. Exh. Four P. 8), the railroad ticket agent sold Pullman fares (P. Exh. Four P. 8), the railroad performed maintenance (P. Exh. Four Pp. 6, 7, 8) and the railroad cleaned the exterior of Pullman Cars (P. Exh. Four P. 6).

In *Robinson,* the Pullman Company organized and controlled its own service (See *Robinson, supra,* p. 93). Here the Seaboard controlled the service as it determined the type and number of Pullman cars to be used (App. on Appeal 46; T-114, 174), when they were to be used (App. on Appeal 84), and when the cars were to be cut off (App. on Appeal 85, 86; T-176). The extent of Seaboard's control was clearly shown here because Felts went to work on the Seaboard because of the Seaboard's decision to add additional sleepers and was taken out of service by the Seaboard's decision to cut off the extra sleepers in Atlanta, Georgia (App. on Appeal 83, 84, 115-117).

Other factors notably different in *Robinson* when compared with Felts include the following:

1. In *Robinson,* the railroad did not charge a fare while in Felts the Seaboard charged all passengers in Pullman cars a first-class fare which was higher than the coach fare or the Pullman fare (App. on Appeal 52, 55, 169).

2. In *Robinson,* the Pullman Company was not guaranteed any return and the Pullman Company bore the expense of the Pullman conductors (See *Robinson, supra,* p. 92). Here the operating railroads guarantee the Pullman Company a return (P. Exh. Four Pp. 10, 11, 12, 26, 27, 28, 44) and it was the Seaboard and not the Pullman Company who bore the expense of the Pullman conductor (P. Exh. Four Pp. 27, 38).

3. In *Robinson,* the Pullman Company furnished all service. In Felts, the railroad reserved the right to furnish part of its own service and required Pullman to furnish partial non-discriminatory service (P. Exh. Four P. 2.)

Two recent decisions from the Circuit Courts of Appeals have followed the reasoning of *Baker* that questions of

employment under FELA are questions of fact for the jury where the evidence of employment was not as preponderating as here. The Tenth Circuit in *Missouri-Kansas-Texas Railway Company* v. *Hearson,* 422 F.2d 1037 (10th Cir. 1970) held that an employee of an independent contractor who was paid by the independent contractor and who furnished his equipment, was as a matter of law, an employee of the railroad because the railroad retained control over his work. Again in *Schroeder* v. *Pennsylvania Railroad Company,* 397 F. 2d 452 (7th Cir. 1968), the Seventh Circuit Court held it to be a jury question as to whether an employee of an independent trucking company was an employee of the railroad since the railroad inspected the trucking company's work, determined what trucks were to be used, and determined the time and manner of pick-up.

Decisions by other Circuit Courts on employment with a railroad include *Byrne* v. *Pennsylvania Railroad Co.,* 262 F. 2d 906 (3rd Cir. 1958) cert. denied 359 U.S. 960, 79 S. Ct. 798, 3 L. Ed. 2d 766 (1959) where a Westinghouse employee paid by Westinghouse and who reported to Westinghouse was held to be an employee of the railroad where the evidence showed that he worked exclusively in railroad equipment, was on call twenty-four hours a day, and the railroad had a right to tell him what he should or should not do.

Finally, in *Cimorelli* v. *New York Central Railroad,* 148 F. 2d 575 (6th Cir. 1945) the Sixth Circuit recognized that the important test in employee-employer relationships is who has the right of control over the details of the work being done and to what extent the person doing the work is independent. The Court held here that an employee of a construction company was an employee of the railroad since the railroad reserved the right to tell the employee when

and where the cars were to be unloaded, determined the number of persons to be put on the job and the amount of equipment to be furnished.

## CONCLUSION

Petitioner submits that the evidence of his employment relationship with the Seaboard was sufficient to make a jury issue as to whether he was an employee of the Seaboard as provided by the Federal Employers' Liability Act. This Court in the past has granted certiorari in order to insure that the intent and language of the Federal Employers' Liability Act as enacted by Congress is uniformly applied and properly enforced by the Courts of this country. Most recently, this Court in *Baker, supra* granted certiorari and held in a per curiam opinion that the question of employment is for the jury under FELA. The petitioner did receive a verdict for $20,000.00 but was set aside on the basis of a case whose facts and circumstances do not parallel the evidence here. Petitioner submits that the court should grant certiorari in order to insure a railroad employee's right of a jury trial under FELA which this Court and other circuit courts of the country have zealously protected.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**CERTIFICATE**

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Ryland S. Felts v. Seaboard Coast Line Railroad Company were deposited in the United States mails, first class, prepaid to Eppa Hunton, IV and E. Kenneth Wheeler, counsel of record for the respondent, Seaboard Coast Line Railroad Company, at their office of Hunton, Williams, Gay and Gibson, at 700 East Main Street, Richmond, Virginia on the 2nd day of June, 1972. It is further stated that the Petition has been served on all parties.

WILLARD J. MOODY

# APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

---

CIVIL ACTION No. 384-69-R

---

RYLAND S. FELTS,

*Plaintiff,*

v.

SEABOARD COAST LINE RAILROAD COMPANY,

*Defendant.*

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**MEMORANDUM OPINION**

Ryland S. Felts instituted this action against Seaboard Coast Line Railroad Company (Seaboard) to recover damages for injuries alleged to have been sustained. He asserts that, while an employee of The Pullman Company (Pullman Company) he was performing services for Seaboard and was also an employee of Seaboard. He grounds his recovery under the Federal Employers' Liability Act (FELA). After filing the original complaint, he amended it to include Pullman Company as a defendant. Pullman Company's motion to dismiss it as a defendant was subsequently sustained, on the grounds that its employees were covered by State Workmen's Compensation Acts and not by FELA. That is, it is not a common carrier by railroad

within the meaning of the Act. However, Felts continued his assertion that he was an employee of both the Pullman Company and Seaboard at the time of the incident in issue.

The issue was tried to the jury which returned a verdict in favor of plaintiff for $20,000.00. Seaboard moved the Court to enter judgment in its favor n.o.v., or in the alternative to set aside the verdict and grant it a new trial on all issues, or, as the second alternative, to grant it a remittiture. Seaboard's grounds for its motion boil down to—

(a) The sufficiency of the evidence to establish that Felts was an employee of Seaboard;

(b) Errors in the charge of the Court;

(c) Errors in the exclusion of evidence offered by Seaboard; and

(d) Excessiveness of the verdict.

I

We commence with the rule that issues of fact should be left to the determination of the jury, and a court should not undertake to substitute its opinion or findings therefor. Likewise, a jury's determination of the credibility of the witnesses and the weight which they see fit to give to their testimony is binding on the Court. However, the jury is not permitted to speculate or conjecture, or to render a verdict based on sympathy. If there is no credible evidence in the record upon which to base a verdict, the Court has a duty to act. Otherwise, the rule would have to be that the findings of the jury would be final and not subject to question. The rule to be followed by the trial court is set out in *Brady* v. *Southern Railway Company,* 320 U.S. 476 (1943). There, the verdict of the jury was set aside and

judgment entered for defendant. In affirming the judgment n.o.v. the Court at page 479 said:

> The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger,* 266 U.S. 521, 524. Cf. *Gunning* v. *Cooley,* 281 U.S. 90, 94; *Commissioners* v. *Clark,* 94 U.S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States,* 319 U.S. 372; *Pence* v. *United States,* 316 U.S. 332; *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U.S. 521, n 1; *Anderson* v. *Smith,* 226 U.S. 439; *Coughran* v. *Bigelow,* 164 U.S. 301, 307; *Gunning* v. *Cooley,* 281 U.S. 90, 93, note; *Seaboard Air Line* v. *Padgett,* 236 U.S. 668, 673; *Parks* v. *Ross,* 11 How. 362, 3673. See IX *Wigmore on Evidence* (3d ed., 1940) , §§ 2494, *et seq.*

The rule in this circuit is set forth in *Club Ramon, Inc.* v. *United States,* 296 F.2d 837 (4th Cir. 1961). At page 840, the Court said:

> It is, of course, the duty of the trial judge to leave issues of fact to the determination of the jury but he is not obliged to submit issues as to whose outcome no

> reasonable doubt can be entertained. "And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' * * * The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' * * * The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. * * *" *Pennsylvania R. Co.* v. *Chamberlain,* 288 U.S. 333, 343, 53 S.Ct. 391, 395, 77 L.Ed. 819. And see *Wachovia Bank and Trust Co.* v. *United States* (4th Cir. 1961) 288 F.2d 750, 757; *Wright* v. *Grain Dealers Nat. Mut. Fire Ins. Co.,* (4 Cir. 1950) 186 F.2d 956, 958.

The Court again spoke on the issue, and directed entry of verdict n.o.v. in *Business Development Corporation of North Carolina* v. *United States,* 428 F.2d 451 (4th Cir. 1970), where the Court said:

> A direction should be granted where there is "no substantial evidence to support" the verdict asked of the jury. *Hawkins* v. *Sims,* 137 F.2d 66, 67 (4 Cir. 1943). Furthermore, even though resolution of the inferences must be left the jury, nevertheless "it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely

upon speculation and conjecture." *Ford Motor Co.* v. *McDavid,* 259 F.2d 261, 266 (4 Cir.), cert. denied 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 229 (1958). That is this case.

In *Old Dominion Stevedoring Corp.* v. *Polskie Linie Oceaniczme,* 386 F.2d 193 (4th Cir. 1967), in approving the action of the trial court in directing a verdict in favor of the shipowner against the stevedoring, the Court said "there was no factual controversy which the jury had to decide for the facts were clear and undisputed."

The Court again spoke in *United States* v. *Shipp,* 409 F.2d 33 (4th Cir. 1969), concerning the test and, although a criminal case, the Court pointed out the same rule applied in civil cases, namely:

> These general principles demonstrate that it is not ordinarily within the appellate court's province to review a jury's resoultion of issues of credibility. The trial judge, who like the jury had the advantage of observing the witnesses as they testified, is vested with broader power. Even when there has been substantial evidence which required him to submit the case to the jury, he may in his discretion set the verdict aside and grant a new trial if he thinks the verdict is against the weight of the evidence, and it is his duty to do so if he is convinced that permitting the verdict to stand would result in a miscarriage of justice. The power exists in both civil and criminal cases.

In *Wachovia Bank and Trust Company* v. *United States,* 288 F.2d 750 (4th Cir. 1961), in approving the entry of a directed verdict, the Court quoted from the opinion of Judge Soper in *United States* v. *Grannis,* 172 F.2d 507

(4th Cir. 1949), setting aside the judgment based on a jury verdict, where at page 513, he said:

> In the federal courts the judge should direct a verdict for either party, even if the party has the burden of proof, when the facts are so convincing that reasonable men could not differ as to their significance, and this is especially true when there is no conflict in the evidence. (Citations omitted) "* * * When, on the trial of the issues of fact in an action at law before a Federal Court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party."

In *Ford Motor Company* v. *McDavid,* 259 F.2d 261 (4th Cir. 1958), cert. denied 358 U.S. 908, the Court set aside a judgment for plaintiff, based on the verdict of a jury, and directed entry of judgment for defendant, saying at page 266, that the old rule of not permitting a jury to draw any inference from circumstantial evidence, if one is as probable as the other, has been replaced by the more sensible rule—

> that it is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the Court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

*See also Norfolk Southern Ry. Co.* v. *Davis Frozen Foods,* 195 F.2d 662 (4th Cir. 1952); *Wright* v. *Grain Dealers Nat. Mut. Fire Ins. Co.,* 186 F.2d 956 (4th Cir. 1950); *Hartman* v. *Baltimore & Ohio R. Co.,* 89 F.2d 425 (4th Cir. 1937).

II

On a motion for judgment notwithstanding the verdict or for a new trial, the Court must view the evidence in the light most favorable to the plaintiff, and such motion should not be granted if there was evidence in the case that would justify the verdict as found by the jury. If more than one reasonable inference can be drawn from the testimony, the Court does not have the right to reject the inference drawn by the jury, or substitute its judgment or opinion therefor. *Warner* v. *Billups Eastern Petroleum Company,* 406 F.2d 1058 (4th Cir. 1969); *Shelton* v. *Jones,* 356 F.2d 426 (4th Cir. 1966); *Richmond Television Corp.* v. *United States,* 354 F.2d 410 (4th Cir. 1965); *Goforth* v. *Avemco Life Ins. Co.,* 368 F.2d 25 (4th Cir. 1966).

III

Keeping in mind the above principles, the evidence in this case establishes that on or about May 7, 1968, Felts, a Pullman Company employee, was assigned by Pullman Company to duty as a Pullman conductor on a Pullman car attached to the train of Seaboard known as the "Silver Comet." The train originated in New York and terminated at Birmingham. It became a Seaboard train only after it reached Richmond, Virginia.

Pursuant to his assignment Felts reported to the train in Richmond. When he arrived he found the Pullman Company porter was unable to open the vestibule trap door.

Felts asked two unidentified station employees to open it. According to Felts, these men performed the act by hitting the trap with a sledge hammer. Later, when the train arrived in Petersburg, the pullman porter again experienced difficulty with the trap. In attempting to open this trap, Felts contends he injured himself.

Felts asserted he reported the alleged injury to the train conductor, but the train conductor denies ever receiving any such report. Seaboard asserts it received no information concerning the injury until the filing of this action. After his return to Richmond, Felts was referred by the Pullman Company to its physicians for examination and treatment.

First, we must determine from the evidence whether Felts was in fact an employee of Seaboard. This determination cannot be made by considering only one fact or set of facts, but must be determined from all of the evidence. To commence, Felts, and all Pullman conductors, are hired, discharged, furloughed, and granted vacations solely by the Pullman Company. All of the equipment and uniforms used by Felts and other Pullman conductors are furnished by Pullman. It alone fixed and pays the wages of Felts. All of the fringe benefits received by Felts or any Pullman conductor are provided by the Pullman Company. The work schedule, and the assignment of Pullman conductors and porters, is done solely by the Pullman Company. It keeps the records of time for its employees, and provides for their sick leave and other benefits. Seaboard had no control over the hiring, discharging, assignment, granting of vacations, seniority, wages, hours or place of employment, furnishing of equipment, assignment of work or duties, or fringe benefits for Felts. Except as hereafter set out, Seaboard had no direction or control over the work of Felts or the manner in which he performed his work. In summary,

the Pullman Company selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, placed and removed them at their pleasure, provided them with uniforms and other equipment, and provided for their fringe benefits.

When Seaboard, or any other railroad, has need for Pullman cars, it makes a request of the Pullman Company to deliver the cars at a stated location and time, with the proper personnel aboard. Pullman owns the cars.

When a Pullman car is attached to the train, it becomes a part thereof. The train conductor is in charge of the train, and is the person primarily responsible for its safe operation. He has jurisdiction over every person on the train. He has the responsibility of determining when and where the train will stop, of maintaining the schedule, and if a dispute arises, he has final say. He has the power to determine when and where a Pullman car will be cut from the remainder of the train, but when the car goes, so do the Pullman employees. While he may have the right to eject a Pullman employee from the train, he does not have the right to discharge him from his employment. As a part of the contract between the railroad and the Pullman Company, the Pullman conductor agrees to be bound by the rules and regulations of the railroad in the performance of his duties as a Pullman conductor. While the railroad agrees to furnish certain services for Pullman including linens, maintenance of air-conditioning equipment, storage space, ice, fuel, etc., nowhere is the railroad granted control over any employee of Pullman to make such a person an employee of railroad. It may well be that the Pullman Company employees, in performance of their duties for Pullman, also performed services for railroad. But, there is no evidence the train conductor had any power or authority

to require or direct the Pullman Company employees to perform services for the railroad. So long as the activities of Felts conformed to the rules and regulations of the railroad, and did not endanger the safety of the train, Seaboard had no control over how Felts performed his duties. Railroad's control was to see that the work was performed in accordance with the contract, in order to accomplish the results contemplated by the parties in making the contract. *Taylor* v. *Local No. 7, Inter. U. of Journeymen Horseshoers, etc.*, 353 F.2d 593 (4th Cir. 1965); *N.L.R.B.* v. *A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964). Some right of control to supervise the manner in which the work is done, or to inspect the work in its performance, does not necessarily create the relationship. Of importance, is the nature and amount of control reserved. *Taylor* v. *Local No. 7, etc., supra*. As the Supreme Court said in *Robinson* v. *Baltimore & Ohio Railroad Company*, 237 U.S. 84, 93, "The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier." And continuing, "To this end the employees of the Pullman Company were bound by the rules and regulations of the Railroad Company."

Felts says that he performed services for the railroad, in that he collected the railroad tickets and later turned them over to the railroad conductor. This same contention was raised in the *Robinson* case, *supra*. Here, like in Robinson, "it was merely an incidental matter which cannot be deemed to qualify the character of plaintiff's employment." Continuing in the *Robinson* case, the Court said:

> We are of the opinion that Congress used the words "employee" and "employed" in the statute in their

natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act.

We conclude that the plaintiff in error, was not an employee of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed.[1]

*See also Wells Fargo & Company* v. *Taylor,* 254 U.S. 175, where the Court held that an employee of an express company which had been granted the exclusive privilege of conducting the express business over the lines of a railroad company, and which transports by cars which it provides and attaches to the railroad's trains, express matter, etc., constitutes a business distinct from that of the railroad, and such employee of the express company is not the employee of the railroad. Since *Robinson,* efforts have been made by Pullman employees to recover of the railroad, asserting such a person is an employee of the railroad. In no cited case has a Pullman employee recovered. *See Lindsay* v. *Chicago, B. & Q. R.R.,* 226 F.2d (7th Cir. 1915); *Wilson* v. *Nashville, C. & St. L. Ry.,* 65 S.W.2d 637 (Tenn. 1933); *Taylor* v. *New York Central Railroad Co.,* 294 N.Y. 397, 62 N.E.2d 777 (1949); *Roby* v. *Boston & Maine R.R.,* 149 N.E.2d 661 (1958); *Gloster* v. *Pennsylvania R.R. Co.,* 214 F. Supp. 207 (W.D. Pa. 1963).

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[1] Quoted with approval in *Edwards* v. *Pacific Fruit Express Co.,* 390 U.S. 538.

Plaintiff says that the Pullman Company is owned by the railroads and that while Felts was working for Pullman, he was in fact working for the railroad. In *Hetman* v. *Fruit Growers Express Company,* 346 F.2d 947, 949 (3d Cir. 1965), the Court in determining *Fruit Growers* was not a common carrier by railroad, referred to *Gaulden* v. *Southern Pac. Co.,* 78 F. Supp. 651 (N.D. Cal. 1948), affirmed per curiam 174 F.2d 1022 (9th Cir. 1949), "where it was held that the Pacific Fruit Express Company, which conducted a business similar in all critical aspects to that of the defendant, here, and which was wholly owned by railroad, was not a 'common carrier by railroad' within the meaning of the Act."

The FELA provides in Section 51 that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury "while he is employed" by such carrier in such commerce. To come within the provisions of the Act, the evidence must show that plaintiff was injured "while he was [is] employed" by the Seaboard. In *Hetman* v. *Fruit Growers Express Company, supra,* the Court following a review of numerous cases on the issue, and saying it could find no case to the contrary, said:

> The sum of the foregoing cases, and we have found none to the contrary, is that one who is employed by an independent contractor is not an "employee" of, or "employed" by, a "common carrier by railroad" merely because the activity in which he is engaged at the time of his injury is such that it could be characterized as an integral part of the railroad's business, or in the words of the present plaintiff, "work that defendant was legally bound to do as a common carrier and

[which was] traditionally performed by railroad employees."

IV

It is clear that FELA does not cover employees of the Pullman Company. *Robinson* v. *Baltimore & Ohio R.R., supra.* The holding in *Robinson* was approved and affirmed in *Edwards* v. *Pacific Fruit Express Co.,* 390 U.S. 538 (1968), without dissent. In *Edwards* the Court said that the *Robinson* case had pointed out that, "It was well known that there were on interstate trains persons engaged in various services for other masters." In *Edwards* the Court held that employees of Pacific Fruit Express Company were not covered by the FELA. The opinion set forth:

> In 1939 Congress substantially amended the Federal Employers' Liability Act. Because of such decisions as *Wells Fargo, supra,* and *Robinson, supra,* one of the proposed amendments would have changed the coverage language of § 1 of the Act to read as follows: "Every common carrier by railroad, including every express company, freight forwarding company, and sleeping-car company, engaged in commerce. . . ." Obviously the proposal was designed to nullify this Court's construction of the Act which had excluded employees of sleeping-car companies and express companies. In committee the proposal received little support and was even opposed by certain segments of organized labor, and it failed to pass. By refusing to broaden the meaning of railroads, Congress declined to extend the coverage of the Act to activities and facilities intimately associated with the business of common carrier by railroad.

Felts and other employees of the Pullman Company are covered under state compensation laws, as were the employees of Pacific Fruit Express Company. In *Edwards* the Supreme Court said that the "question of whether employees shall rely on state compensation or on the Federal Employers' Liability Act is a pure question of legislative policy—we do not think this Court should depart from 60 years of history to do what is a job for Congress."

The holding of the *Robinson* case has been consistently followed by all courts, without exception. See cases cited above on page 25.

V

Plaintiff relies on *Baker* v. *Texas & Pacific R.R.*, 359 U.S. 227 (1959). There the Court said the issue "contain[s]ed factual elements such as to make it one for the jury under appropriate instructions as to the various relavant factors under law." It was further pointed out that a supervisor of the railroad "in the daily course of the work exercised directive control over the details of the job performed by the individual workmen," and other details, and that each case must be decided on its own peculiar facts Defendant also relies on *Smith* v. *Norfolk and Western Railway Co.*, 407 F.2d 501 (4th Cir. 1969). There, Smith was an employee of Baker Drive-Away Company, Inc., which unloaded automobiles from cars of the railroad company. The Court said "in our case the plaintiff was *not* an employee of the railroad, but was employed by the company held to be performing railroad functions." Continuing, the Court said the railroad "contracted with the shippers specifically to assume the duty of unloading" and were paid for so doing; that the unloading "had been specifically assumed by the railroad as part of its regular business." In

the case at bar, Felts makes no contention his employment by the Pullman Company was to perform services which the railroad had contracted to perform, or which had historically and traditionally been done by the railroad. The duties performed by Felts were the same as those which had always been performed by Pullman conductors.

VI

Other issues have been raised in defendant's motion, but in view of what has been said above, the Court does not reach the other issues. Accordingly, the motion of the railroad for judgment n.o.v. is granted, the verdict of the jury is set aside and judgment is entered for the railroad. Counsel will within seven (7) days present a duly endorsed order in accordance with this opinion. In lieu of the endorsed order, counsel may give notice to opposing counsel of the time when an order will be presented, serving with said notice a copy of the proposed order.

/s/ RICHARD B. KELLAM
United States District Judge

Norfolk, Virginia
September 3rd, 1971.

# United States Court of Appeals

## FOR THE FOURTH CIRCUIT

No. 71-2021

Ryland S. Felts,

*Appellant,*

*versus*

Seaboard Coast Line Railroad Company,
a body corporate,

*Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard B. Kellam, District Judge.

(Argued March 6, 1972. Decided March 15, 1972.)

Before Haynsworth, Chief Judge, and Butzner and Field, Circuit Judges.

Raymond H. Strople (Willard J. Moody, and Moody, McMurran and Miller on brief) for Appellant, and E. Kenneth Wheeler and T. S. Ellis, III, (Eppa Hunton, IV, and Lewis Booker, and Hunton, Williams, Gay and Gibson on brief) for Appellee.

Per Curiam:

Upon consideration of the briefs and oral argument, we affirm for the reasons stated by the District Court.

*Affirmed.*

## TABLE OF CONTENTS


*Page*

I. Preliminary Statement ..... 1

II. Questions For Review ..... 2

III. Statement Of The Case ..... 2

Proceedings Below ..... 2

The Injury ..... 4

The Employment Issue ..... 6

Pullman's Operations On The Ground ..... 6

Pullman's Operations En Route ..... 8

IV. Argument:

Seaboard Was Entitled To Judgment As A Matter Of Law 12

*Baker* v. *Texas* Is Not Relevant ..... 17

Seaboard Was Entitled To A Directed Verdict Or In The Alternative To Judgment Notwithstanding The Verdict ..... 19

The Relationship Between Felts And Pullman Epitomized The Usual And Natural Employment Relationship ..... 21

Pullman Alone Had Control Over The Details Of Felts' Work ..... 22

V. Conclusion ..... 26

Certificate Of Service ..... 27

Appendix

## TABLE OF CITATIONS

**Cases** *Page*


Baker v. Texas, 359 U.S. 227 (1959) ..... 17, 18, 19, 20, 23

Beaty Shopping Center, Inc. v. Monarch Ins. Co. of Ohio, 315 F.2d 467 (4th Cir. 1963) ..... 19, 20

Brady v. Southern Railroad, 320 U.S. 476 (1943) ..... 19

Cimorelli v. New York Central Railroad, 148 F.2d 575 (6th Cir. 1945) ..... 22

Del Vecchio v. Pennsylvania Railroad Company, 233 F.2d (3rd Cir. 1956), cert. den. 352 U.S. 909 ..... 25

Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968) ..... 13, 19

Gaulden v. Southern Pacific Railroad Co., 78 F. Supp. 652 (N.D. Cal. 1948) ..... 18

Gloster v. Pennsylvania R. R., 214 F. Supp. 207 (W.D. Pa. 1963) 16

Hetman v. Fruit Growers Express Co., 346 F.2d 947 (3rd Cir. 1965) ..... 18

Jones v. New York Central R. Co., 182 F.2d 326 (6th Cir. 1950) 19

Lindsay v. Chicago, B. & Q. R. R., 226 F. 23 (7th Cir. 1915) ..... 14

Robinson v. Baltimore & O. R. R., 237 U.S. 84 (1915) 12, 13, 14, 15, 16, 17, 18, 19, 23, 26

Roby v. Boston & Maine R. R., 149 N.E.2d 661 (Mass. 1958) ..... 14, 15

Roberts v. Missouri Pac. R. Co., 352 U.S. 500 (1957) ..... 20

Tarboro v. Reading Company, 396 F.2d 941 (3rd Cir. 1968) ..... 25

Taylor v. New York Central Railroad Co., 294 N.Y. 397, 62 N.E.2d 777 (1949) ..... 15

Thornton v. Norfolk & Western Ry. Co., 307 F. Supp. 667 (E.D. Va. 1969) ..... 18

Turpin v. Chicago, Burlington Ry., 403 S.W.2d 233 (Mo. 1966) 16, 18, 20

*Page*

Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920) ..... 19

Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637 (Tenn. 1933) 15

**Other Authorities**

Hearings before subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act 76 Cong., 1st Sess., 57, 58 (1939) ..... 14

Rule 56, Fed. R. Civ. P. ..... 3

Sheppard's United States Citations ..... 16

# Supreme Court of the United States

No. 71-1582

RYLAND S. FELTS,

*Petitioner,*

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I.

### PRELIMINARY STATEMENT

In seeking certiorari, Petitioner is asking this Court to overturn almost 60 years of well-established, unanimous precedent. In addition, he seeks to have this Court re-try facts already thoroughly and maturely considered by the presiding judge and the Court of Appeals. More importantly, the case itself presents no matter of special or far-reaching importance. On the contrary, the question raised is one which cannot have any significance outside of this case, inasmuch as on January 1, 1969, The Pullman Company ceased all operational activity. As of that date, it no longer employed any Pullman conductors, porters or other sleeping car

personnel. The Pullman Company is now concerned solely with winding up its affairs.

## II.

## QUESTIONS FOR REVIEW

(1) Should the Court reverse almost 60 years of precedent in a case of no special or important significance?

(2) Should the Court reverse the judgment on the evidence made by the Trial Court and concurred in by the Court of Appeals?

## III.

## STATEMENT OF THE CASE

### Proceedings Below

Petitioner (Felts), an employee of The Pullman Company (Pullman) since 1944, brought this action under the Federal Employers' Liability Act (FELA) to recover for injuries allegedly suffered by him while on duty as a Pullman conductor on the tracks of Respondent, Seaboard Coast Line Railroad Company (Seaboard). He alleged that Seaboard had failed to furnish him a safe place to work as required under FELA.

As a Pullman employee, Felts was entitled to seek the benefits provided by Virginia's Workmen's Compensation Law. But he elected to forego those benefits in favor of an action against Seaboard grounded on the contention that he was, at any given time, the employee of the particular railroad on the tracks of which he was performing his duties as a Pullman conductor.

Felts subsequently amended his Complaint to include Pullman as a party defendant. Both defendants, after answering, moved for summary judgment. Thereafter, Pull-

man's motion for summary judgment was granted on the ground that Pullman was not a common carrier within the meaning of FELA. Although Seaboard's motion for summary judgment was ultimately denied, the Court never reached the merits of that motion but instead based its decision on a finding that the technical requirements of Rule 56, Fed R. Civ. P., had not been met.

The matter was tried in the United States District Court, Eastern District of Virginia, Richmond Division, before the Honorable Richard B. Kellam of the Norfolk Division and a jury. After deliberations, the jury returned a general verdict against Seaboard in the amount of $20,000.00.

Seaboard made several post-verdict motions. By way of summary, the issues raised by those motions included the following:

(1) The applicability of FELA to employees of Pullman,

(2) The sufficiency and weight of the evidence on the employment issue,

(3) The adequacy of the Court's charge on the employment issue,

(4) The omission of any reference to federal or state income taxes in the Court's charge on damages,

(5) The Court's exclusion of admissible evidence on the issue of employment, and

(6) The manifestly excessive verdict.

After briefs and oral argument, the Trial Court granted Seaboard's motion for judgment n.o.v.

On Appeal, the Fourth Circuit, in a one-sentence *per curiam* opinion, agreed that Seaboard was entitled to judgment as a matter of law and, alternatively, that the jury

verdict was manifestly against the weight of the evidence and reasonable men could not differ on the fact that Felts was not an employee of Seaboard. The judgment for Seaboard was, accordingly, affirmed.

All page references will be made either to the printed appendix on appeal (App. ....), the Exhibit Volume (Exh. ....), or on a few occasions to the original transcript (Tr. ....). The Exhibit Volume includes the Uniform Service Contract which will be abbreviated "U.S.C.," the Pullman Conductor's Manual which will be abbreviated "P.C.M.," and the Seaboard Conductor's Manual which will be abbreviated "S.C.M."

**The Injury**

On May 7, 1968, Felts was assigned by Pullman to duty as a Pullman conductor on the Silver Comet. Originating in New York and terminating in Birmingham, this train became a Seaboard train only after it reached Richmond.[1]

After receiving his assignment from Pullman, Felts went to the station in Richmond to board the train. When he arrived, he found that the Pullman porter was unable to open the platform trap door on the sleeping car "Delaware County." This car was owned by the Pennsylvania Railroad (App. 150, 192) and leased to Pullman. (App. 191)[2] Upon

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[1] There is no evidence found at App. 83-84 that "[n]ormally only one sleeper was used on the Silver Comet with no Pullman conductors" as stated in Felt's Petition at page 3.

[2] Pullman cars were owned by various railroads and leased to Pullman which, in turn and by contract (Exh. U.S.C.), furnished the cars, along with Pullman service, to the railroads. Although the District Court's Memorandum Opinion dated September 3, 1971 states that Pullman owned the car in question, the Court was made aware of the ownership of the car by the Pennsylvania Railroad prior to entry of judgment n.o.v. (See letter dated September 7, 1971, included as Appendix hereto.) In any event, Pullman, not Seaboard, furnished the sleeping car in question.

inquiry, Felts learned from the porter that the door was jammed. Felts did not attempt to open this door himself nor did he make any report regarding the door at that time. Instead, he asked two unidentified Union Station employees to attempt to open the trap door. (App. 109) (There was no evidence that these men were employed by Seaboard.) According to Felts, these two men took a large sledge hammer and succeeded in loosening and opening the door.

Later, on arrival in Petersburg, the Pullman porter discovered that the platform trap door was jammed once again and that he was unable to open it. At this point, Felts knew that the door was jammed, (App. 140), that the porter had been unable to open it and that it had taken considerable force to open it when it had previously jammed in Richmond. Felts also knew that passengers would be boarding in Petersburg, because he possessed a diagram furnished him by the ticket office at Richmond's Union Station. In addition, according to Felts' own testimony, he had been suffering from a painful back problem. (App. 136)

Nevertheless, Felts chose to disregard all this and instead of reporting the jammed door and boarding the passengers through another door or seeking help, he leaned over without bending his knees and attempted to pull up on the door to open it. According to Felts, this act caused his injury. (App. 114)

After returning to Richmond, Felts was referred to a number of doctors by Pullman. (App. 124-127) In general, the medical evidence showed that Felts had suffered no more than a back strain which doctors agreed was not of a permanent nature. (Tr. 60-61, 292) Indeed, the doctors were unable to find objective symptoms long before the trial. (Tr. 49, 307) Several doctors repeatedly recommended to Felts that he return to work. (App. 154-155) Despite this, Felts has never returned to work.

**The Employment Issue**

Pullman is a long-existing corporation with headquarters in Chicago. Until January 1, 1969, it had been in the business of providing sleeping car service to railroad passengers for a century. The working relationship of Pullman and its employees to the railroad on the tracks of which they operated was, then, of long duration and precisely that which one would expect.

PULLMAN'S OPERATIONS ON THE GROUND

In Richmond Pullman employed seven conductors, including Felts, thirty or thirty-five porters, three car cleaners, two electricians, a clerk-steno, a substitute clerk-steno and an agent-foreman, the supervisor in charge. (App. 182, 202) The Pullman conductors were protected by a collective bargaining agreement. (App. 184) This was a bilateral labor contract between Pullman and its conductors' bargaining agent, a different union division from that which represents the conductors of Seaboard. (App. 60-61)

John J. Duss, a Seaboard witness at the trial, was the Pullman agent-foreman; Marion Creed Bales, whose deposition was read to the Court and jury at the instance of Felts, was the regular Pullman clerk-steno. The non-conflicting testimony of these two witnesses provides a clear picture of Pullman's office and yard operations.

Normally, each train had a regular consist of one or more Pullman cars. Passengers with Pullman tickets would occupy space in these cars. If, however, there were more Pullman passengers than could be accommodated in the regular consist Pullman equipment, Seaboard would notify Duss or Bales of the number of passengers needing sleeping car space. Then, Pullman, not Seaboard, would determine the type of equipment on hand that would fill the need. Duss

or Bales would make the selection from the Pullman sleeping cars on hand. Duss or Bales would then specify the car or cars to be supplied and would assign the Pullman conductor and the porters to that equipment. (App. 84-85, 183) Pullman would outfit the car with linen and supplies. (App. 205)[3]

Duss put it this way:

> "Q. Now, if one of the railroad common carriers wanted to have additional sleeping facilities, how would that be relayed to you?
>
> How would that come in to Pullman Company?
>
> A. About that particular time we were hauling quite a number of draftees or military, we would get those requests over the phone from the Seaboard and they would tell us the number of men that they would have or expect to have, and then *we* would figure on that many beds to provide. *We* would select cars to fill that requirement.
>
> Q. And would you also select crews to fill that requirement?
>
> A. Yes." (App. 183, emphasis added)

And Pullman employee Bales, Felts' witness, testified as follows on this point:

> "Q. When the train arrived in Richmond, who would determine the need for additional Pullman sleepers?
>
> Bales: The Seaboard Coast Line.
>
> Q. How would this information come to you?
>
> Bales: The Seaboard Coast Line would call me. They would request the equipment.

[3] Pullman leased the cars from the various railroads, fully equipped with the original complement of blankets, linens, mattresses and supplies for commissary service. Thereafter, Pullman was solely responsible for maintaining, repairing and replacing this equipment.

Q. What would they specify to you?
You said they would request equipment. What would they say to you?

Bales: They might say that they had 75 men today going to Atlanta. *I* would have to figure out the type of equipment they would require from the layover equipment in the yard to accommodate 75 people.

Q. What else would you do?

Bales: *I* would assign the conductor and the porter to the equipment." (App. 85, emphasis added)

Duss was also responsible for inspecting the sleeping cars in Richmond. He would assign Pullman employees to the task of repairing and maintaining these cars (App. 191), including the repair and maintenance of the car platform doors (App. 192). This was not work that was performed by Seaboard (App. 204) but by Pullman. Once a sleeping car was assigned to a train by Pullman it would be removed by the railroad only if there appeared to be a running defect or if the car otherwise became unsafe to operate. (App. 194, 201) Nonrunning defects, such as the defective platform door involved herein, which were discovered en route were required to be reported by the Pullman conductor to Pullman. (App. 74)

Duss also arranged for and conducted the safety meetings held by Pullman for its employees, frequently having guest lecturers from the railroad on the subject of railroad safety. (App. 189)

### Pullman's Operations En Route

The manual entitled "General Instructions" issued by Pullman to its conductors in 1952 (Exh. P.C.M.) is comprehensive in its coverage, instructing Pullman conductors and porters on matters ranging from the control of pets in

Pullman cars to the proper procedure to follow in preparing accommodations for Pullman car passengers. Significantly, this manual defining the duties of Pullman personnel on Pullman cars is published by Pullman and distributed only to Pullman conductors and porters. In fact, B. Carnes, Seaboard conductor, stated unequivocally that he had never seen the book (App. 177-178) and was wholly unfamiliar with its contents. (Carnes was guided by the Seaboard Conductor's Manual [Exh. S.C.M.]).

The Pullman manual spells out the relationship of car service employees to each other and to the train conductor.

> "Car service employes are subject to instructions issued by all Officers of the Company and their representatives who act in a supervisory capacity. While on cars, on trains, in stations and yards, or on other railroad property, they also are subject to instructions of the train conductor and officials of the railroad companies.
>
> "The Pullman conductor has jurisdiction over all car service employes on cars in his charge and is responsible for their performance and for coordination and harmony between all members of the crew.
>
> "The Pullman conductor is required among other things to receive passengers, assign accommodations and make collections therefor, rigidly supervise the service, and enforce observations of regulations of the Company by car service employes under his jurisdiction, especially those concerning the comfort of passengers. . . ." (Exh. P.C.M. 1)

This division of authority and responsibility is shown by the testimony of Felts' witness, Pullman conductor Rieley and by that of Seaboard conductor Carnes.

Rieley on direct examination:

> "A Pullman conductor is a sleeping-car conductor who has ***full charge operationwise of sleeping cars*** on

> any given train; in normal assignment of space and general operation of the cars." (App. 47, emphasis added)

Carnes:

> "Actually, I'm in charge of the train. I'm responsible for the conduct, the safety and keeping the train on time and to lift the—my company's transportation, and, also, I—I'm in charge of my baggagemaster and my flagman and my porter, and I assign their duties, see that they are carried out." (App 162)

Rieley also testified that a Seaboard conductor would only have control over the Pullman cars in "an untowards situation." (App. 48)

Carnes' undisputed testimony was that a Seaboard conductor could not sit down and work in a Pullman car or even open a door to a sleeping car room without the permission of the Pullman conductor or porter (App. 162, 174); that he had no key to the sleeping cars or to the locked compartments in them (App. 164, 179); that he never knew the number of Pullman employees on his train or their names (App. 163); that he never knew when they boarded or got off his train or on which car they were stationed (App. 162-163); that he was ignorant of their working hours and their assignments; that he had no knowledge of Pullman rates or Pullman ticket procedures (App. 163); and that the only reports he received from the Pullman crew were in the case of an emergency. (App. 166)

Both in the Trial Court and in the Court of Appeals, Felts contended that Seaboard controlled the details of his work. Both courts rejected this contention for the truth of the matter is that the control exercised by railroad conductors over Pullman employees on board trains is that kind

of control necessary for maintaining the safety and integrity of the train. A train conductor is, as Carnes with some understandable pride testified, "captain of the ship." (App. 174) A railroad conductor is *ultimately* responsible for all operational matters pertaining to the train. This has always been true.

Felts has never denied that he was an employee of Pullman at the time of the alleged accident and that he had been a Pullman employee at all times since Pullman hired him in 1944. Indeed, Felts' counsel conceded this early in the trial. (App. 38)

It is also clear beyond question from the record that the terms and conditions of Felts' employment were set by Pullman and not by Seaboard or any other railroad. In this regard, it was firmly established that Pullman and not Seaboard hired Felts, (App. 38, 65, 153), trained him, (App. 38), fixed and paid his wages with a Pullman check drawn on a Pullman account with a Chicago bank, (App. 97, 104-105, 153), provided his fringe benefits, (App. 76-77), furnished all of the equipment and clothing used by him in the performance of his duties, (App. 38, 68-75), defined his duties, (App. 64, 66, 67, Exh. P.C.M.), evaluated his work performance, (App. 188), set his work and vacation schedules, (App. 67-68, 75, 77-78, 82, 85, 89, 105, 188), and exercised control over the details of his tasks as a Pullman conductor. (App. 187-188, Exh. P.C.M.) In addition, it is also abundantly clear from the record that while a railroad might ask Pullman not to use certain of its employees on its trains, only Pullman had the power to discharge, lay off or furlough Pullman conductors, including Felts. (App. 78-79, 190-191)

## IV.

## ARGUMENT

### Seaboard Was Entitled To Judgment As A Matter Of Law

The inapplicability of FELA to Pullman employees is well settled. The issue was squarely resolved by this Court in *Robinson* v. *Baltimore & O.R.R.*,[4] a decision that was confirmed by congressional action and has been uniformly followed in subsequent cases. There is no contrary precedent.

In *Robinson*, a Pullman porter brought an action under FELA against the B. & O. Railroad to recover damages for injuries allegedly sustained while performing his duty as a porter-in-charge of a Pullman car attached to a B. & O. train. The Trial Court directed a verdict in favor of the Railroad. The judgment was affirmed first by the Court of Appeals and then by a unanimous opinion of this Court, which held as a matter of law that Pullman employees are not employees of a railroad for purposes of suit under FELA. Writing for the Court, Mr. Justice Hughes stated that Congress had plainly and deliberately excluded Pullman employees from coverage under FELA. The Justice concluded that the absence from FELA of any specific reference to Pullman employees was evidence of an exclusionary intent, since Congress was unquestionably aware that Pullman employees worked on interstate trains. The Court stated:

> "It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among

[4] 237 U.S. 84 (1915).

> those to whom the railroad company was to be liable under the Act."[5]

Contrary to assertions in Petitioner's brief, these remarks make it unmistakably clear that this Court was holding as a matter of law that Congress did not intend to include Pullman employees within the scope of FELA. Pullman employees were intentionally left free to pursue their remedies under the common law or state workmen's compensation schemes.

Subsequent efforts in Congress to amend FELA to embrace various categories of excluded employees, including those of Pullman, confirmed the validity of the Court's reading of congressional intent in *Robinson*. A summary of those efforts is presented in this Court's opinion in *Edwards* v. *Pacific Fruit Express Co.*,[6] a case holding that refrigerator car companies, like Pullman, are not within the scope of FELA. There, Mr. Justice Black, writing for a unanimous Court stated:

> "In 1939 Congress substantially amended the Federal Employers' Liability Act. Because of such decisions as *Wells Fargo* . . . and *Robinson* . . ., one of the proposed amendments would have changed the coverage language of § 1 of the Act to read as follows:
>
> 'Every common carrier by railroad, including every express company, freight forwarding company, and sleeping car company, engaged in commerce . . .'
>
> Obviously, the proposal was designed to nullify this Court's construction of the Act which had excluded employees of sleeping car companies and express companies. In committee the proposal received little support and was even opposed by certain segments of organized labor, and it failed to pass. By refusing to

[5] 237 U.S. at 94.
[6] 390 U.S. 538 (1968).

> broaden the meaning of railroads, Congress declined to extend the coverage of the Act to activities and facilities imminently associated with the business of common carrier by railroad."[7]

*Accord, Roby* v. *Boston & Maine R.R.,* where the Supreme Court of Massachusetts said:

> "The amendment effective August 11, 1939 [citations omitted], of the Federal Act did not change the law in this respect. It broadened the Act in its application to the carriers' employees; it did not expand the latter category. [citations omitted] The committee report shows that a proposal to broaden the act to include express, freight forwarding and sleeping car companies was expressly rejected."[8]

Congress, in short, though given a clear opportunity to overturn *Robinson,* chose not to do so. Further, the nature of the rejected amendments confirmed the Court's holding that Congress intended to exclude Pullman employees from FELA coverage.

*Robinson,* similarly, has been consistently followed by all other courts, both state and federal, that have ruled on the applicability of FELA to Pullman employees. The issue arose again less than five months after *Robinson,* this time in a Seventh Circuit case, *Lindsay* v. *Chicago, B. & Q. R.R.*[9] There the widow of a Pullman waiter and cook brought an action for wrongful death under both FELA and the Colorado Wrongful Death Act. The Seventh Circuit, regarding itself bound by *Robinson,* wasted little time

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[7] 390 U.S. at 538, footnotes omitted.

[8] 149 N.E. 2d at 663. *See also* Hearings before subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act 76 Cong., 1st Sess, 57, 58 (1939).

[9] 226 F. 23 (7th Cir. 1915).

in affirming the Trial Court's dismissal of the FELA action.

The question recurred next in 1933 in *Wilson* v. *Nashville, C. & St. L. Ry.*[10] The widow of a Pullman conductor brought a wrongful death action under FELA after her husband fell off the observation platform of a non-Pullman railroad car. On these facts, the Tennessee Court of Appeals, citing *Robinson,* held that a Pullman conductor is not an employee of the railroad for purposes of FELA.

In 1949 the New York Court of Appeals in *Taylor* v. *New York Central Railroad Co.*[11] considered whether a Pullman porter could maintain an action under FELA to recover damages for injuries allegedly sustained when the car in which he was riding derailed and overturned. The porter claimed that for purposes of FELA he was an employee of the New York Central Railroad Company, as well as of Pullman. The Court of Appeals relied on *Robinson* and had little difficulty in concluding, *inter alia,* that Pullman employees are not covered under FELA.

Thirteen years after the *Taylor* case, the unavailability of FELA to Pullman employees was affirmed again, this time by the Supreme Judicial Court of Massachusetts in *Roby* v. *Boston & Maine R.R.*[12] In that case a Pullman porter sued the Boston & Maine Railroad to recover damages for personal injuries received as a result of a collision of railroad cars, relying in part on FELA. Citing *Robinson,* the Railroad moved for directed verdict on the FELA cause of action. After the Trial Court erroneously denied the motion, the Supreme Judicial Court on appeal unanimously held that:

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[10] 65 S.W. 2d 637 (Tenn. 1933).
[11] 294 N.Y. 397, 62 N.E. 2d 777 (1949).
[12] 149 N.E. 2d 661 (1958).

> "It was error not to enter a verdict for the defendant under count 2 [FELA count]. The plaintiff for purposes of the Federal Employers Liabilities Act was an employee of the Pullman Company and not an employee of the defendant. This is established by *Robinson* v. *Baltimore & Ohio Railroad* . . . [citation omitted]."[13]

Finally, as recently as 1963 the issue appeared in *Gloster* v. *Pennsylvania R.R.*[14] A Pullman porter died from injuries received while engaged in an attempt to extinguish a fire on a Pennsylvania Railroad train. His widow sued the Railroad, basing her claim in part on FELA. The Court dismissed this cause of action, relying heavily upon *Robinson.* Although the Court noted that the plaintiff made no averment as to any relationship of employment between the decedent and the Railroad, this was not the basis for the FELA dismissal. Instead, by quoting extensively from the Robinson opinion, the Court in *Gloster* went out of its way to make unmistakably clear that an amendment to include an averment of employment relationship would have been to no avail.[15]

This, then, is a complete summary of the reported cases since *Robinson* that have ruled on the precise question whether a Pullman employee is also an employee of a railroad for purposes of FELA. Every single one of these cases involved substantially similar employment facts as those alleged herein and each has held unequivocally that a Pullman employee is not such a railroad employee. All of these cases rely on the Court's ruling in *Robinson,* a decision never criticized in other reported cases, much less ignored or over-

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[13] 149 N.E. 2d at 662.

[14] 214 F. Supp. 207 (W. D. Pa. 1963).

[15] This reading of the *Gloster* opinion is supported by the Supreme Court of Missouri's characterization of that opinion in *Turpin* v. *Chicago Burlington Ry.,* 403 S.W. 2d 233, 240 (1966).

ruled.[16] Indeed, the fact that the issue has been raised so few times since *Robinson* is an indication that it has long been considered to have been firmly settled once and for all by *Robinson*. By the same token, *Robinson* governs the case at bar.

### Baker v. Texas[17] Is Not Relevant

Felts relies heavily on *Baker* v. *Texas*. However, a careful and rigorous analysis of that case reveals that his reliance is misplaced. In *Baker,* the Texas & Pacific R.R. contracted with W. H. Nichols & Co., to repair, strengthen and stabilize the Railroad's track bed. Plaintiff's decedent had been hired by Nichols to work along the track bed and was struck and killed by a train while so engaged. Plaintiff brought an action under FELA, alleging that his decedent was killed while "employed" by the Railroad within the meaning of FELA. The trial judge declined to submit the employment issue to the jury, holding as a matter of law the decedent was not in such a relationship to the Railroad at the time of his death as to entitle him to the protection of FELA. Ultimately, this Court reversed, holding that the Trial Court had erred in refusing to submit the issue of employment to the jury.

*Baker,* however, is clearly distinguishable from the case at bar because it did not involve the employment relationship, if any, between a Pullman employee and a railroad. As indicated previously, the Court in *Robinson* made it unmistakably clear that the FELA does not cover Pullman employees. Such was the intent of Congress, and, as we have seen, this continues to be the intent of Congress, *Baker* necessarily, therefore, did not overrule *Robinson*. On the

[17] 359 U.S. 227 (1959).

[16] *See* Shepard's United States Citations.

contrary, it cited *Robinson* with approval.[18] *Baker,* unlike *Robinson,* deals with persons who may come under the coverage of FELA if they can establish the requisite employment relationship.

There is yet another distinction between the *Robinson* and *Baker* decisions. The employment relationship dealt with in *Robinson* and present in the instant case is a precise, traditional, well-defined employment relationship, the characteristics of which are easily specified and remain essentially constant. By contrast, the types of employment relationships governed by *Baker* belong to a miscellaneous class of employment relationships with varying characteristics. Unlike the employment relationship in both *Robinson* and the instant case, the miscellaneous class of relationships governed by *Baker,* between a railroad on the one hand, and a contractor and its employees on the other, can vary in an infinite variety of ways thereby frustrating any effort to generalize accurately about this class of relationships. For example, at one extreme the contractor may simply be the alter ego of the railroad created by the latter in an effort to avoid the consequences of FELA.[19] The other extreme would seem to be the case of a wholly independent contractor carrying on its operations entirely independently of the railroad and exercising exclusive control in the relevant sense over its employees. Between these two extremes, one can postulate endless variations.[20] It is no wonder, then, that

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[18] 359 U.S. at 228. *See also Hetman* v. *Fruit Growers Express Co.,* 346 F.2d 947 (3rd Cir. 1965), which explicitly stated that *Baker* made it abundantly clear that the *Robinson* case was still the law of the land.

[19] *See Gaulden* v. *Southern Pacific Railroad Co.,* 78 F. Supp. 652 (N.D. Cal. 1948). Note, however, that the ownership of a contractor by a railroad is irrelevant in the absence of fraud. *See Turpin* v. *Chicago Burlington Ry.,* 403 S.W. 2d 233, 240 (1966).

[20] One of these variations was presented in *Thornton* v. *Norfolk & Western Ry. Co.,* 307 F. Supp. 667 (E.D. Va. 1969) a case decided by the Trial Court herein. There, Judge Kellam quite properly followed *Baker.*

the *Baker* case required an employment relationship issue of this nature to be submitted to the jury.[21]

Significantly, the furnishing of Pullman sleeping car service is neither traditionally nor historically a railroad function. It is traditionally and historically a function of Pullman. On this account, it is not surprising to find that courts have also excluded employees of Railway Express, Inc. from coverage under FELA.[22] Like employment relationships involving Pullman employees, those involving Railway Express employees are also traditional and well-defined with characteristics which are easily specified and essentially constant.

In conclusion, then, *Robinson* and its progeny, together with *Edwards* leave no doubt that the continuing intent of Congress is that Pullman employees are excluded from coverage under FELA. Seaboard, therefore, was entitled to judgment as a matter of law.

**Seaboard Was Entitled To A Directed Verdict Or In The Alternative To Judgment Notwithstanding The Verdict**

It is settled beyond doubt that in federal cases a verdict should be directed or a judgment entered notwithstanding a verdict whenever reasonable men viewing the evidence in the light most favorable to the party against whom the motion is sought could not reach differing conclusions.[23] It is also settled that parties in federal cases cannot avoid a directed verdict or judgment notwithstanding the verdict simply because there is a scintilla of evidence to support that

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[21] Examples of cases of this sort are cited in Petitioner's brief at page 12.

[22] *See Jones* v. *New York Central R. Co.*, 182 F.2d 326 (6th Cir. 1950). *See* also *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920).

[23] *See Brady* v. *Southern Railroad*, 320 U.S. 476 (1943); *Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio*, 315 F. 2d 467 (4th Cir. 1963).

party's position.[24] Nor is there any doubt that these standards are also applicable to employment relationship issues in FELA cases. Thus, neither the well-known *Rogers* v. *Missouri Pac. R. Co.* case.[25] nor the *Baker* case, discussed above, precluded the entry of judgment notwithstanding the verdict in the instant case.

This point is well illustrated by *Turpin* v. *Chicago, Burlington & Quincy Ry. Co.*,[26] a case very similar to the case at bar. In that case, plaintiff was employed by a truck line which was wholly owned by the railroad and which had contracted with the railroad to load and unload trailers used in "piggy back" operations. Injured in the course of these operations, plaintiff brought an FELA action against the railroad alleging joint employment. At trial, plaintiff presented evidence which tended to show, *inter alia*, that railroad employees inspected the loading for safety and security and often issued orders to plaintiff in this regard. The jury found for plaintiff and the Trial Court entered judgment notwithstanding the verdict on the ground that the evidence was insufficient to establish the fact that plaintiff was an employee of the railroad.

On appeal, plaintiff contended that the *Rogers* and *Baker* cases required the Court to submit the employment issue to the jury. The Supreme Court of Missouri, *en banc*, disagreed.

> "Counsel say that under the FELA decisions, any evidence 'even the slightest,' will make a jury issue. They cite *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500 . . . [citations omitted]. Those cases all involved issues of negligence or proximate cause under the FELA, and it was to the proof on those questions that the remarks

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[24] *See Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio*, 315 F. 2d 467, 469 (4th Cir. 1963).

[25] 352 U.S. 500 (1957).

[26] 403 S.W. 2d 233 (1966).

relied upon by plaintiff were directed. On the other hand, it seems clear that the burden of proving *employment* by the defendant in FELA cases is on the plaintiff, that this question is to be determined under general law (general federal law, if there be any difference), and that the terms 'employer' and 'employee' are used in the act in their usual and natural sense." [citations omitted]

"Plaintiff relies rather strongly on Baker . . . as to the sufficiency of the evidence, but Baker does not either by its own language or by subsequent constructions, hold that any evidence which may possibly tend to show employment forecloses a directed verdict or a summary judgment." 403 S.W. 2d at 237-38. (emphasis in the original)

Thus, the Court clearly established that the standards governing directed verdicts and the entry of judgment notwithstanding the verdict in FELA cases are the same as those which govern in federal cases generally. From this, the Court went on to affirm the Trial Court's entry of judgment for the railroad, holding that the railroad's ownership of the truck line was irrelevant in the absence of fraud and that reasonable men could not differ in concluding that plaintiff was not an employee of the railroad even though plaintiff had presented some evidence on this point.

Given this standard, judgment notwithstanding the verdict was appropriate in the instant case. Reasonable men viewing the evidence in the light most favorable to Felts could not differ in concluding that Felts was not an employee of Seaboard under FELA.

### The Relationship Between Felts And Pullman Epitomized The Usual And Natural Employment Relationship

Felts has conceded that only Pullman had the power to hire, discharge, furlough, train and transfer him. (App.

38, 77-78, 189-191) He also concedes that only Pullman provided him with vacations and scheduled them. (App. 105, 188) Pullman also paid Felts' wages, established his work schedules and assignments and provided all of his fringe benefits. (App. 67-68, 76-77, 82, 85, 89, 104-105, 153) Further, despite Felts' reluctance to admit it, the record unequivocally establishes that Pullman provided him with *all* equipment such as uniforms, rate books, call cards and fare books. (App. 38, 68-76)

### Pullman Alone Had Control Over The Details Of Felts' Work

Power to control is undoubtedly relevant in considering whether Felts was a Seaboard employee. However, it is important to have clearly in mind the kind of control that is relevant. To be sure, the railroad conductor is the "captain of the ship," responsible for the safe operation of the train. As such and to this extent, he has jurisdiction over every person on the train. But this is not the kind of control which is relevant in determining whether Felts was an employee of Seaboard under FELA. Instead, the cases clearly establish that the crucial factor is not the existence of power to control incident to safety and operational exigencies, but rather, whether there is control over the manner in which the details of the particular task are to be executed.[27] The Supreme Court of Missouri put this point well in the *Turpin* case.

> "Generally, the reservation of the right to control the details of the work, as distinguished from its result, is the material factor. *Chicago, Rock Island & Pacific Railway Co.* v. *Bond*, 240 U.S. 449, 36 S.Ct. 403, 60 L.Ed. 735. We note in passing: that 'occasional direc-

[27] *See Cimorelli* v. *New York Central Railroad*, 148 F. 2d 575 (6th Cir. 1945).

tions' given by a railroad crew to the employees of a carloading company working on railroad premises are not controlling (*Latsko* v. *National Carloading Co.*, 192 F.2d 905); that express messengers, working regularly on trains in cars furnished by the railroad, are not its employees (*Jones* v. *New York Central Railroad*, 182 F.2d 326; *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205) nor is there a joint employment; that an employee of Missouri Pacific Truck Lines, crushed between two highway trailers being loaded on a flatcar of the Missouri Pacific Railroad, was not an employee of the railroad, when hired and paid by the wholly owned subsidiary, and that he was not doing railroad work (*Fawcett* v. *Missouri P.R.R. Co.*, 242 F.Supp. 675, aff. CA 5, 347 F.2d 233); that a general control over all transportation functions does not suffice to make an employee of the Pullman Company an employee (also) of the railroad (*Gloster* v. *Pennsylvania R.R.*, 214 F. Supp. 207)." 403 S.W.2d 233, 240.

*Accord, Robinson* v. *Baltimore & O. R.R.*, where Mr. Justice Hughes also made this point.

> "The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation."

Similarly, the control considered relevant by this Court in the *Baker* case was the railroad supervisor's:

> ". . . directive control *over the details of the job* performed by the individual workmen, including the pre-

> cise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture." 359 U.S. at 228, 229. (emphasis added)

No such control was exercised by Seaboard or any other railroad over the details of Felts' work. On the contrary, the record discloses that Pullman and not Seaboard exercised control over the details of Felts' work. Thus, Felts himself admitted that he had complete "jurisdiction over the service of the Pullman cars." (App. 146) Former Pullman conductor Rieley also admitted on direct examination that a Pullman conductor had "full charge operationwise of sleeping cars on any given train; in the normal assignment of space and the general operation of the cars." (App. 47) In the same vein Rieley read the following paragraph from the Pullman "General Instructions" (Exh. P.C.M.) and admitted that the paragraph was valid for normal operations:

> "The Pullman conductor has jurisdiction over all car service employees on cars in his charge and is responsible for their performance and for coordination and harmony between all members of the crew." (App. 64)

In fact, a thorough review of the Pullman "General Instructions" (Exh. P.C.M.) makes abundantly clear the comprehensive nature of the control exercised by Pullman over every detail of Felts' work.

Nor is the conclusion contradicted in the slightest by the selective examples cited by Felts in his brief. Every example treated by Felts concerned the control necessary for operational safety, not supervision over the details of Felts' work, Thus, Felts cannot rely on the train's conductor's power to remove unruly persons from the train, his power to resolve disputes that cannot be settled by the

Pullman conductor and his power to waken a sleeping Pullman conductor who is supposed to be awake and supervising his cars. All these powers are totally consistent with a train conductor's traditional responsibility for the safety of his train and its passengers. These powers do not reflect control over the details of Felts' work as a Pullman conductor.

In sum, then, the cases clearly establish that the type of control relevant in considering whether Felts was an employee of Seaboard under FELA is not the railroad's authority over everyone on board as to matters of operational safety, but, rather, the control over the details of Felts' work. As Felts' own evidence reveals, the details of his work were controlled by Pullman and not by Seaboard.

Recently, in a case very similar to the instant case, a District Court in the Eastern District of Pennsylvania granted a directed verdict in an FELA action on the ground that plaintiff's evidence showed that plaintiff was solely an employee of a freight handler and forwarder and not a joint employee of the latter and a railroad. The Third Circuit affirmed this decision and in the course of its opinion used language which aptly describes the case at bar.

> "The usual tests evidencing appellant's bona fide employment by Northern are all present. Northern selected him, hired him, paid him, could discharge him and directed and controlled his work. . . . The cooperation and assistance furnished by the railroad helped enormously in the successful accomplishment of Northern's task but it was Northern who controlled the way it performed its job."[28]

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[28] *Tarboro* v. *Reading Company*, 396 F. 2d 941 (1968) quoting from *Del Vecchio* v. *Pennsylvania Railroad Company*, 233 F. 2d (3rd Cir. 1956), cert. den. 352 U.S. 909.

A directed verdict was unquestionably proper in these cases. A judgment n.o.v. was unquestionably proper in the case at bar.

## V.

## CONCLUSION

Like the plaintiff in *Robinson,* this Petitioner was an employee of Pullman. As such, they were both required to obey all rules and regulations of the railroad over the lines of which the cars of Pullman were operating. (237 U.S. 84, 89-90, fn. 1, para. Sixth) At best, Felts showed only that he was subject to the railroad's operating rules and regulations while engaged in his work for Pullman. This was basically the argument made in *Robinson* and this Court put it to rest with this language:

> "The service provided by The Pullman Company, was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employees of The Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation." (237 U.S. 84, 93)

The Court followed up with this:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employe." (237 U.S. 84, 94)

Felts has cited no case impairing the continued validity of *Robinson* and he has cited no case holding that a Pullman employee such as he can forego his rights against his

employer and receive, through judicial action, a windfall from a railroad having no employment connection with him. Every reported case since 1915 has resolved this exact issue in the manner urged herein. This, along with the conclusions drawn from the evidence by the Trial Court and the cessation of operations by Pullman render this an inappropriate case in which to grant certiorari.

Respectfully submitted,

SEABOARD COAST LINE RAILROAD COMPANY

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**CERTIFICATE OF SERVICE**

I certify that I have had mailed three copies of the foregoing brief to Willard J. Moody, Esquire, Moody, McMurran and Miller, 200 Professional Building, Portsmouth, Virginia 23704, counsel for Petitioner, this 28th day of June, 1972.

EPPA HUNTON, IV

# APPENDIX

September 7, 1971

230-618-33

Ryland S. Felts v. Seaboard Coast Line Railroad Company —In the United States District Court for the Eastern District of Virginia, Richmond Division—Civil Action No. 384-69-R

The Honorable Richard B. Kellam
United States District Judge
United States District Court
Eastern District of Virginia
Norfolk Division
Norfolk, Virginia 23510

Dear Judge Kellam:

We received the memorandum opinion in this case today and we were, of course, pleased with the Court's decision. However, although we do not think that it is at all significant in the opinion, we felt that we should, nevertheless, point out to the Court one error in its factual recitation: On page 10 the Court wrote that "Pullman owns the cars." The evidence was that the railroad cars were owned by various railroads, the car in question being owned not by Seaboard but by the Pennsylvania Railroad.

We will promptly tender the appropriate order to counsel for the Plaintiff.

Respectfully,

/s/ R. Kenneth Wheeler
R. Kenneth Wheeler

345/319
cc: Mr. W. Farley Powers, Jr., Clerk
Raymond H. Strople, Esquire